BHR GROUP LTD (UK)

v.

WITECH SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL AZIZ RAHIM JC
[SUIT NO: 22-44-2001 (MR)]
6 AUGUST 2003

CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside, application for - Principles applicable - Whether judgment obtained regularly - Whether judgment in default of defence entered without notice to opposing counsel is irregular - Whether defendant must show prima facie defence on the merits in order to have default judgment set aside - Sarawak Advocates Ordinance (Practice & Etiquette) Rules 1988, r. 56 - What constitutes sufficient notice - Rules of the High Court 1980, O. 19 r. 2 RHC*

CIVIL PROCEDURE: *Judgment - Default judgment - Notice to opposing counsel - Nature and form of notice - What constitutes sufficient notice - Whether notice can be implicit, implied or indirect - Whether judgment in default of defence entered without explicit notice to opposing counsel is irregular - Sarawak Advocates Ordinance (Practice & Etiquette) Rules 1988, r. 56 - Rules of the High Court 1980, O. 19 r. 2 RHC*

LEGAL PROFESSION: *Practice and etiquette - Default judgment - Notice of intention - Failure to give opposing counsel notice of intention to enter judgment by default - Whether renders default judgment irregular - Nature and form of notice - What constitutes sufficient notice - Whether notice can be implicit, implied or indirect - Sarawak Advocates Ordinance (Practice & Etiquette) Rules 1988, r. 56 - Whether rules of practice and etiquette regulate the procedure of legal proceedings in the High Court*

This was an appeal from the decision of the deputy registrar dismissing the defendants' application to set aside the judgment in default of defence entered by the plaintiff. It was contended that the default judgment was irregular and not in accordance with the law, principally because it was entered without the plaintiff having given the requisite notice to the solicitors for the defendants in keeping with r. 56 of the Sarawak Advocates Ordinance (Practice & Etiquette) Rules 1988 ('the SAOR') which is in pari materia with r. 56 of the Legal Profession (Practice & Etiquette) Rules 1978 ('the LPR'). The defendants argued that the plaintiff's failure to give such a notice had deprived them of their right to be heard.

Held (dismissing the appeal):

[1] A default judgment will be set aside by the court if it is found to have been obtained irregularly. On the other hand, if the default judgment is obtained regularly, then the court will not set it aside unless the party against whom it has been entered can show that it has a good defence. In other words, there must be an affidavit of merits, *ie*, an affidavit stating facts showing a defence on the merits. (pp 366 h, 367 d-f, 368 d-e & 373 g-h)

[2] Non-compliance with r. 56 of the SAOR or LPR does **not** automatically render a judgment entered in default of appearance or of defence irregular. The court need only consider the fact that there has been such a non-compliance. Rule 56 of the SAOR or LPR does **not** have greater force than the Rules of the High Court 1980 ('the RHC'), videlicet, O. 19 r. 2 of the RHC. The rules of practice and etiquette only regulate the conduct and discipline of advocates and solicitors; they do **not** regulate the procedure of legal proceedings in the High Court which are governed by the RHC. Rule 56 of the SAOR or LPR cannot excuse or condone complacency or sloppiness on the part of the practitioner. (pp 368 f-h, 369 a, f-h & 370 a-b)

[3] Although counsel for the plaintiff did not, in his correspondence with counsel for the defendants, expressly spell out to the latter that he would be seeking to enter judgment by default of defence, yet this did **not** derogate from the plaintiff's right to enter final judgment against the defendants under O. 19 r. 2 of the RHC. In any case, the letters of correspondence from counsel for the plaintiff to counsel for the defendants should have left the latter in no doubt at all that the plaintiff was highly disinclined to grant the defendants any concessions in terms of not proceeding to enter judgment in default of defence against the defendants. Hence, the judgment in default of defence entered by the plaintiff was, in the circumstances, a regular judgment. (pp 370 c, 371 d, h & 372 a-c)

[4] A 'written notice' under r. 56 of the SAOR can take **any** form – depending on the circumstances of each case – so long as one party makes it clear to the other party that he intends to proceed with the matter despite the other party's plea for more time. In this regard, the said letters of correspondence from counsel for the plaintiff to counsel for the defendants could well constitute sufficient notice under r. 56 of the SAOR. (p 372 d-e)

[5] The defendants also did not have a *prima facie* defence on the merits. (pp 373 g-h & 374 f)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 ***(refd)***

B Dialdas & Co Pte Ltd v. Sin Sin & Co [1984] 2 MLJ 223 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Rakyat [1979] 1 MLJ 23 ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

Hasbullah Chan & Associates Architect v. Rahika Development Sdn Bhd [2000] 7 CLJ 109 HC ***(dist)***

Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1985] 2 CLJ 97; [1985] CLJ (Rep) 760 HC ***(refd)***

Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors [1998] 1 CLJ 960 CA ***(refd)***

Vijendran Poniah v. MBf Country Homes & Resorts Sdn Bhd & Anor [2002] 2 CLJ 157 HC ***(refd)***

Wan Mohd Sofian Wan Md Saad v. MBf Finance Bhd [2000] 1 CLJ 492 HC ***(dist)***

Legislation referred to:

Legal Profession Act 1976, s. 77

Legal Profession (Practice and Etiquette) Rules 1978, r. 56

Rules of the High Court 1980, O. 19 r. 2

Sarawak Advocates Ordinance (Practice and Etiquette) Rules 1988, r. 56

For the plaintiff - Bong Ah Loi; M/s Bong & Co

For the 11th defendant - Ma Seong Yuin; M/s Kadir, Wong, Lin & Co

For the 1st, 2nd, 4th, 6th, 7th, 8th, 10th, 13th, 15th, 18th, 19th & 20th defendants - Tai Choi Yu; M/s Tai Choi Yu & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Aziz Abdul Rahim JC:

This is an appeal by the 1st, 6th, 7th, 8th, 13th, 19th and 20th defendants (collectively "the defendants") against the decision of the learned deputy registrar given on 8 November 2001 dismissing the defendants' application by summons-in-chambers (encl. 79) to set aside a judgment in default of defence ("JID") entered by the plaintiff against the defendants and also for stay of all proceedings pending the final disposal of encl. 79.

The defendants' application in encl. 79, was supported by an affidavit of one Tai Choi Yu, the defendants' advocate ("Tai's affidavit").

The defendants alleged in para. 5 of Tai's affidavit that the judgment in default entered against the defendants was irregular and not made in accordance with law. The defendants contended that this was so because the plaintiff did not give the necessary notice to the defendants or their solicitor before entering the judgment in default (JID). In particular the defendants contended that no notice was given pursuant to r. 56 of the Sarawak Advocates Ordinance (Practice and Etiquette) Rules 1988.

This is the sole ground on which the defendants grounded their appeal against the deputy registrar's decision.

Rule 56 of the Sarawak Advocates Ordinance (Practice and Etiquettes) Rules 1988 provides as follows:

> Where the name of the advocate or his firm appears on the court record or the fact of representation is known to the other side, no advocate representing the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any order in the proceedings by such first-named advocate, unless he shall have given to such first-named advocate written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first-named advocate.

Learned counsel for the defendants submitted that the failure of the plaintiff's advocate to give notice to the defendants' advocate of the intention to enter JID pursuant to r. 56 of the Advocates (Practice and Etiquette) Rules 1988 had denied the defendants the right to be heard, hence rendering the JID obtained as irregular and not in accordance with law.

Counsel for the defendants cited *Wan Mohd Sofian Wan Md Saad v. MBf Finance Bhd* [2000] 1 CLJ 492 to support his contention.

In that case the court had to consider, as one of the issues, whether the plaintiff's solicitor's non compliance with r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978 was a factor that should have been considered by the court. It is to be noted that r. 56 Legal Profession (Practice and Etiquette) Rules 1978 is in *pari materia* with r. 56 Sarawak Advocates (Practice and Etiquette) Rules 1988. It is also pertinent to note that in *Wan Mohd Sofian*'s case the plaintiff had entered judgment against the defendant and the court found as a matter of fact that there was no evidence of any notice being given to the defendant's solicitor of the plaintiff's intention to do so. On r. 56 Legal Profession (Practice and Etiquette) Rules 78, his Lordship Kamalanathan Ratnam, J in *Wan Mohd Soffian* at p. 496 said:

> Clearly the Plaintiff ought to have given the Defendant such notice. There is no evidence before me of any such notice being given at all. The legal profession in Malaysia is governed by the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession Act 1976 (the Act). Various subsidiary legislation in the form of rules have been gazetted under the rule-making powers contained in the said Act. The object of these rules is to ensure that advocates and solicitors conduct their affairs in an honourable and fair manner befitting the practice of law. Therefore in an application to set aside a judgment obtained in breach of any of the said rules or the provisions of the Act the court ought to consider such a breach.

Learned counsel for defendants also cited the High Court case of *Hasbullah Chan & Associates Architect v. Rahika Development Sdn. Bhd.* [2000] 7 CLJ 109. In that case, the plaintiff entered judgment in default of defence eleven months after the defendant had filed the memorandum of appearance and this was done without giving any notice of intention to enter judgment to the defendant, a move contrary to r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978 which was made pursuant to s. 77 of the Legal Profession Act 1976.

As regard r. 56, his lordship Abdul Malik Ishak J said at p. 119 of the report:

> ... by necessary implication it imports the *audi alteram partem* rule and clearly therefore, on the facts, the Plaintiff has breached the rule of natural justice by not adhering to Rule 56 thereof. A plain reading of Rule 56 clearly shows that the parties to an action must conduct their affairs in a fair, orderly manner adhering strictly to the rules of natural justice.

Then at p. 121 his Lordship said:

> Reverting back to Rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978,1 have this to say. It has the force of law and its breach must be considered in the light of an application to set aside a judgment-in-default-of-defence (compare the decision of *Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors* [1988] 1 MLJ 33 with that of *Wan Mohd Sofian bin Wan Md. Saad v. MBf Finance Berhad* [2000] 1 CLJ 492).

It can be seen from the two cases cited by the learned counsel for the defendants, a breach of r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978, which is in *pari materia* with r. 56 of the Sarawak Advocate Ordinance (Practice & Etiquette) Rules 1988, will be taken into consideration by the court in exercising its discretion whether or not to set aside a judgment in default. However in those two cases there was no evidence at all as to notice being given to the other counsel before the judgment in default was entered. Also to be noted is that the cases do not decide in what form the notice should take.

The learned counsel for defendants also cited the case of *Vijendran Poniah v. MBf Country Homes & Resorts Sdn. Bhd. & Anor* [2002] 2 CLJ 157. In that case the first defendant entered judgment in default of appearance against the plaintiff without having served the summons on the plaintiff and without giving any notice under r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978 to the plaintiff solicitor despite the fact that the plaintiff was represented by solicitors was known to the first defendant's solicitor. However in *Vijendran* case the learned trial judge, his Lordship Kamalanathan Ratnam J, did not make much of the failure to serve the notice under s. 56 of the Legal Profession (Practice and Etiquette) Rules 1978. In my view this is because the learned judge found that there are more serious acts on the part of the defendant in that case that rendered the judgment in default obtained as irregular. At p. 171 of the report, when awarding aggravated damaged to the plaintiff the learned judge said.

> Every action and step taken by the Defendants from the beginning was dishonest, malicious and totally reckless.

It is trite that the court would set aside a judgment in default if it is found to be irregular. But if the judgment in default is a regular judgment the court would be slow to set it aside unless the defendant could show that he has a good defence on merits.

Under O. 19 r. 2, where the plaintiff's claim is for a liquidated sum, as in this case, if the defendant fails to serve a defence on the plaintiff, the plaintiff may after the expiration of the period fixed by the rules for service of defence, enter final judgment against the defendant for a sum not exceeding the sum claimed and cost.

Order 19 r. 9 gives the court discretion to set aside or vary any judgment entered in default as a result of procedural non compliance.

In *Evans v. Bartlam* [1937] AC 473, at p. 480 Lord Atkin said:

> The principle obviously is that unless and until the court has pronounced a judgment on merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

The principle in *Evans* has been followed in Malaysia. See Malaysian High Court Practice – High Court Malayan Law Journal 1998 at p. 539.

In *Evans* there is also a passage, at p. 480, by Lord Atkin which reads:

> The Courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence.

Again, this principle has been approved in the Federal Court case of *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat* [1979] 1 MLJ 23 where at p. 24 the Federal Court said:

> It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

So, the proposition in this case is that the defendants may apply to set aside the judgment in default (JID) if it can be shown that it is irregularly obtained and that the defendants have a defence on merits which the defendants must show in an affidavit supporting the application to set aside the JID.

The question before me, therefore, is whether the failure to give notice under r. 56 of the Practice and Etiquette Rules 1988 renders the JID obtained by the plaintiff in this case irregular so as to entitle the defendants to set it aside.

The secondary question is that if notice is given what is the form of notice and what constitutes a proper notice.

On the first question it is to be noted that in the cases cited by the learned counsel for the defendants, nothing was said that non compliance with r. 56 of the Practice and Etiquette Rules rendered the JID in those cases irregular. All those cases said was that it has to be taken into consideration. I do not accept that r. 56 of Practice and Etiquette Rules can override or has greater force than the Rules of the High Court on this matter. The purpose of the rules on practice and etiquette is to regulate the conduct of advocates or solicitors between they and the court and amongst themselves in handling their clients' briefs or cases. Those rules do not regulate the proceedings in the High Court which are governed by the High Court Rules 1980. Assuming for a moment that in a given case the plaintiff has filed a summons against the defendant and the summons was properly served on the defendant solicitor. The defendant solicitor did not enter any defence within the period specified under the rules of court; would not the plaintiff solicitor be entitled under the rules to apply for final judgment against the defendant? It must be remember that the rules of the court apply equally to the plaintiff and the defendant. The

defendant ought to have known and in fact is expected to know the risk of not entering appearance or defence within the period specified under the rules. It is only a matter of courtesy and good etiquette between solicitors that notice is required to be given to the other of the intention to enter JID. The rule is not meant to excuse complacency or sloppiness on the part of the practitioner.

In *Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors.* [1988] 1 MLJ 33 the High Court said:

> It is not in dispute that the Practice and Etiquette Rules have the force of law. The Rules were made by the Bar Council in pursuance of the powers conferred upon it by section 77 of the Legal Profession Act, 1976. In Re S. Fung, A Solicitor, the Court held that the Rules regulating the practice and etiquette of the Singapore Bar which had been made under section 31(1)(a) of the Advocates and Solicitors Ordinance had the force of law.
>
> The question to be considered here is whether non-compliance with Rule 56 renders the judgment obtained in default of defence an irregular judgment.
>
> The Practice and Etiquette Rules 1978 were made by the Bar Council for the purpose of "regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors". See section 77(1) of the Legal Profession Act. Sub-section (3) of section 77 of the Act states that any advocate and solicitor who fails to comply with the said Rules may be liable for disciplinary proceedings.
>
> ...
>
> In my opinion, the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court. Indeed, the Bar Council has no power under the Legal Profession Act to make rules to regulate procedure of legal proceedings.
>
> The rules regulating and prescribing the procedure and practice to be followed by the High Court are found in the Rules of the High Court 1980. These rules were made by the Rules Committee under powers conferred upon it by section 17 of the Courts of Judicature Act 1964. Order 1 Rule 2(1) of the Rules of the High Court explicitly states that "these rules shall have effect in relation to all proceedings in the High Court ..."
>
> It is clear, therefore, that non-compliance with Rule 56 of the Practice and Etiquette Rules 1978 does not render the judgment in default of defence, as in the instant case, irregular. Under Order 2 Rule 1 of the Rules of the High Court, only failure to comply with the Rules of the High Court shall be treated as an irregularity. In other words judgment in default of defence is only an irregular judgment if the Plaintiff, in obtaining the judgment, failed to comply with the rules of the High Court.

I agree with the conclusion of the learned judge in *Asia Commercial Finance* above that the legal proceedings before the High Court is not regulated by the Legal Profession (Practice and Etiquette) Rules 1978 for Semenanjung or Advocates (Practice and Etiquette) Rules 1988 for Sarawak. The proceedings before the High Court are regulated by the High Court Rules 1980 made by the Rules Committee under the provisions of the Courts of Judicature Act 1964. In my view therefore non-compliance with the requirement of r. 56 Practice and Etiquette Rules does not render a judgment obtained in default of appearance or defence an irregularity.

It is also to be noted in that in all the cases cited by the learned counsel for the defendants to support his contention, it was an undisputed fact that no notice under r. 56 was given at all. On this point the instant case can be distinguished. The affidavit in opposition affirmed by one Merlyn Toh Ah Mei ("Toh's affidavit") on 21 November 2001 and filed by the plaintiff to oppose the defendants application in encl. 79, clearly showed, through exh. MT1 to the affidavit, that the learned counsel for the defendants wrote a letter dated 21 June 2001 to the counsel for plaintiff stating as follows:

We refer to the above captioned suit.

> Please be advised that we have so far been instructed to act for the 1st, 7th and 8th Defendants and we are trying to establish and to finalise all the Defendants that we shall be representing herein so that we can file in the Memorandum of Appearance and/or Defence expeditiously instead of piecemeal.
>
> Please contact us if you have any enquiries on our said representation and refrain from further action on the same until you hear from us again.

At this point it is pertinent to note that from the court's records and file, the writ of summons and the statement of claim by the plaintiff were filed on 11 May 2001. They were duly served on the respective defendants. (See affidavits of service by Ahmad Zaini bin Zaidini, encl. (14), encl. (8), encl. (44) and encl. (90)

The writ was not served on the 3rd, 14th, 16th defendants (see affidavit of non-service encl. (91)).

Appearance was entered by 1st, 7th & 8th defendants on 23 June 2001 (encl. 6). Appearance by 6th & 20th defendants was entered on 5 July 2001 (encl. 10). Appearance by 17th defendant was entered on 18 July 2001 (encl. 16). Appearance by 19th defendant was entered on 30 July 2001 (encl. 23). Appearance by 5th defendant was entered on 4 September 2001 (encl. 48). Appearance by 2nd, 4th, 10th, 13th, 15th & 18th defendants was entered on 9 October 2001 (encl. 57).

It can be seen therefore that the writ of summons and the claim were served on the 1st, 6th, 7th, 8th, 13th 19th and 20th defendants. Their counsel entered appearance for them except for the 13th & 21st defendants who did not enter any appearance.

It is also to be noted from the court record and file that besides the 5th, 11th & 17th defendants no other defendant has filed any defence.

Now, in response to the learned counsel for the defendant's letter of 21 June 2001, as quoted above, the learned counsel for plaintiff wrote a letter in reply on 22 June 2001 in the following terms:

> We refer to the above captioned matter and your letter dated 21st June, 2001.
>
> We are regret to inform you that we have instruction from our client not to grant you or any Defendants any indulgence not to proceed further. Our instruction is to act expeditiously unless your clients file and serve their Memorandum of Appearance within the prescribed period. Please treat this letter as the necessary notice.

This exchange of letters between the counsel for the plaintiff and the defendants clearly shows that the plaintiff was adamant not to grant any extension of time to the defendants. The letter from the learned counsel for the plaintiff stated in no uncertain terms that they were under instruction to act expeditiously in the matter and even drew the attention of the defendants counsel to treat the letter on the necessary notice.

I am fully aware that in the plaintiff's counsel letter to the learned counsel for defendants, no reference was made to the filing of statement of defence. The said letter only referred to "our instruction is to act expeditiously unless your clients file and serve their Memorandum of Appearance within the prescribed period". I also noted that the JID was entered against defendant 1st, 7th and 8th on 23 July 2001, after the defendants have entered their appearances. On 23 June 2001 JID against 6th and 20th defendants were obtained on 23 July 2001 and 8 August 2001 respectively after they filed their appearance on 5 July 2001. JID against 2nd, 4th, 10th, 15th & 18th defendants were entered on 13 November 2001 after they have entered appearance on 9 October 2001. JID against 19th and 21st defendants was entered on 22 August 2001 after defendant 19th had entered appearance on 30 July 2001. The 21st defendant did not entere any appearance at all.

From the chronology of events above, it can be seen that, except for the 21st defendant the other defendants relevant to this appeal, had ample time to file their defence. But they did not do so. It is an undisputed fact even at the time of hearing of this appeal before me, they have not filed their defence.

Thus in my view, even though the letter in reply by the learned counsel for plaintiff to the defence counsel's letter dated 21 June 2001 requesting for time (it is implicit any way even though it did not state so expressly) did not make any reference to the filing of the defence, it does not in any way deprive the plaintiff of his right under the rules to apply for JID against the defendants in default of defence.

It is also to be noted that the learned counsel for defendants is an experienced advocate and it should dawn on him that when the plaintiff counsel stated in the letter that his instruction was to act expeditiously and that the defendant was to treat the letter same as a necessary notice, it is to be expected that the plaintiff counsel would take every possible course of action available under rule to expeditiously deal with the matter in order to obtain judgment for his client's claim. In the circumstances I conclude that JID entered into by the plaintiff in this case is a regular judgment.

As to the format of notice under r. 56 of the Practice and Etiquette Rules, there is no specific form of notice being prescribed by the High Court Rules 1980 or the Legal Profession Act 1976 or the Sarawak Advocates Ordinance. Therefore the notice could take any form, depending on the circumstances of each case, so long as it is made clear to the other side that the plaintiff or the defendant as the case maybe, intends to proceed with the matter regardless of the other side plea for time. In my view the letter of 22 June 2003 by the plaintiff counsel to the defendant counsel in this instant case constitutes a sufficient notice to comply with the requirement of r. 56 of Sarawak Advocate Ordinance (Practice & Etiquette) Rules 1988.

As to the merit of the defence, there was none. The plaintiff's claim against the defendants was grounded on a breach of fiduciary duty under a contract of agency and constructive trust. The plaintiff is a company incorporated in the United Kingdom and has it registered address in the United Kingdom. The 1st defendant is a Malaysian registered company and having address in Miri Sarawak. The 2nd, 3rd, 4th, 5th and 6th defendants were at all material times directors of the 1st defendant. The 7th defendant is a Business Development Co-ordinator of the 1st defendant and the principal person in charge of the 1st defendant's operations in Miri. The 8th defendant was at all material times the authorised signatory of the 1st defendant's current account No. 36091-3500042-3-000 with Sime Bank Bhd (now RHB Bank Berhad) Miri. By a series of letters exchanged between the plaintiff and 1st defendant between July 1997 and March 1998, through the 7th defendant, the plaintiff appointed the 1st defendant as the sale agent for the plaintiff's business in Malaysia. The 1st defendant was promised by the plaintiff a commission of 7.5% of the selling price for the businesses secured.

In early July 1988, Sarawak Shell Sdn. Bhd. awarded the plaintiff, through the 1st defendant, the contract to design, manufacture, supply and performance guarantee of one (1) unit of Liquid Gas Eductor valued at British £54,825.00. On 15 December 1998 the plaintiff delivered the Liquid Gas Eductor to Shell Sdn. Bhd. and they later confirmed to the plaintiff that they (ie, Sarawak Shell) had made payment of RM357,315.60 (equivalent of £54,825.00 then) to the 1st defendant and this said sum was paid to the 1st defendant's current account in trust for the plaintiff.

Despite several demands by the plaintiff, it was alleged that the 1st defendant, in breach of its fiduciary duty under the contract of agency, has failed or refused to remit the sum of RM328,548 (equivalent to £52,250 after deducting the commission of 7.5% of the selling price).

It was also alleged in para. 13 of the plaintiff's statement of claim that the two cheques issued by the 1st defendant that is Sime Bank cheque No. 049687 dated 5 September 1999 and Bumiputra Commerce Bank Bhd. cheque No. 0585079 were returned by the plaintiff's Banker in England with a 'stop payment' instruction from the 1st defendant. It was alleged in para. 13(v) of the statement of claim that the 1st defendant by a letter dated 3 July 2000 admitted to the plaintiff that the 1st defendant is now penniless and unable to account to the plaintiff for the payment received on behalf of the plaintiff. In para. 14 of the statement of claim it was claimed that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants knowingly withdrew on the account they received on behalf of the plaintiff and converted them for their own use by dismissing and issuing cheques on the current account in which the money was paid into and purportedly to be held in trust for the plaintiff in favour of 3rd parties and strangers, comprising the 9th to 21st defendants, the particulars of which were given in that paragraph of the statement of claim.

In his affidavits affirmed on 7 November 2001 in support of the defendant's application in encl. (79) to set aside the JID, Mr. Tai Choi Yu, of counsel for the defendants in this appeal, did not disclose any tenable or reasonable grounds of defence on merits to the above allegations except to say in para. 5 of his affidavit that the plaintiff had failed to give notice to counsel for the defendants before ensuing the JID.

I have said earlier, and I also referred to some authorities, that if a defendant is trying to set aside a regularly obtained judgment, defendant must show by affidavit evidence that he has a defence on merit. In this case this was not done. Furthermore, until the hearing of this appeal no defence was file by any of the defendants in this appeal.

In *B Dialdas & Co. Pte Ltd v. Sin Sin & Co.* [1984] 2 MLJ 223, it was held that:

> The court's discretion under the rule must however be exercised in accordance with the settled principle that if the judgment is a regular judgment, then it is an almost inflexible rule that there must be an affidavit showing a defence on the merit.

In *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1985] 2 CLJ 97; [1985] CLJ (Rep) 760, in dismissing the appeal of the appellant to set aside the judgment in default, his lordship Edgar Joseph Jr. J (as he then was) held that what is crucial in an application of this sort is whether there was evidence before the court disclosing a *prima facie* defence to the plaintiff's claim for possession or in other words, a defence on the merits.

In *Stamford Holdings Sdn. Bhd. v. Kerajaan Negeri Johor & Ors.* [1998] 1 CLJ 960, the Court of Appeal held that:

> The court would assume the contents of the Statement of Claim to be true in the absence of a defence being filed by the respondents ...
>
> The facts as stated in the Statement of Claim clearly showed the unconscionable or unmeritorious conduct of the respondents. At least those facts were, in the absence of any defence filed, assumed true, and stood unrebutted and would constitute a good cause of action against the respondents.

A perusal of Mr Tai's affidavit in support of the defendants' application, shows that there is not an iota of evidence showing a *prima facie* defence on the merits other than the allegation of non compliance with rule or direction or provision or regulation as set out in para. 5 of Mr Tai's affidavit. Further, up to this very point, the defendants for reasons unknown have not even filed their statement of defence.

For the foregoing reasons I dismiss this appeal with cost to the plaintiff.